

**STUDY PAPER
ON
WRONGFUL INTERFERENCE WITH GOODS**

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY

By:

**RALPH L. SIMMONDS
and
GEORGE R. STEWART**

with David P. Paciocco



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EXECUTIVE SUMMARY

This Study Paper, written for the Ontario Law Reform Commission, examines critically the remedies available to those persons whose goods, or whose interests in goods, have been wrongfully interfered with by some other person.

Remedies for wrongful interference with goods is one of the most complex, intricate, and dispersed areas of law. Much of the law developed at a time when the requirements for commencing legal proceedings were quite different, and more complicated, from what they are today. The subject matter examined in the Study Paper includes very old legal causes of action, such as the action of replevin (to recover possession of goods), trespass to goods (which is concerned with the wrongful touching or taking of goods), and detinue (which deals with the wrongful withholding of goods). It also includes some relatively modern developments, such as the tort of conversion (which deals broadly with any dealing with goods in a manner inconsistent with the rights of the person entitled to them), the negligent causing of economic loss, and the tort of interference with a reversionary (or non-possessory) interest. The subject matter also includes the ancient self-help remedy of "recaption" (which is the taking of possession of goods by a person with a right to immediate possession of them), as well as other remedies concerning the recovery of goods.

The authors explore the complexities and deficiencies in the present law of remedies for wrongful interference with goods and conclude that, while radical reform is not necessary, the law needs to be amended by statute. Given the obvious overlap between many of the causes of action described above, and the fact that the rigid distinction between the property torts is essentially anachronistic since the abolition of the old "forms of action", which established rather artificial barriers to pursuing legal remedies, the authors make specific recommendations that seek to rationalize the law in this area. The Study Paper would retain much of the substance of the present law, but would make it more coherent as well as more consistent with the law and practice in closely related fields.

The Study Paper recommends that the law in the area should be dealt with by a statute that provides for a new tort called "wrongful interference with goods". The new tort includes the present actions of conversion, detinue, trespass to goods, injury to a reversionary interest in goods, negligence (if it results in loss or damage to goods) and, where appropriate,

damage or loss arising out of breach of contract. In addition, the draft statute contains several provisions that seek to modernize and rationalize the present law. Among the more notable provisions are those that will make the new tort of wrongful interference with goods far less a matter of strict liability, that is, liability in the absence of fault. The draft Act will allow a wrongdoer who is not a merchant to defend a lawsuit by showing that he or she made a reasonable mistake. In addition, the Act will permit a defendant to argue that the plaintiff's own actions contributed to the loss, so that any damages ordered to be paid by the defendant should be reduced. It also provides for the right of one wrongdoer to obtain some compensation from other wrongdoers who also caused the loss to the plaintiff.

The recovery of goods will be more readily available in a wider range of fact situations. The draft Act provides for a general right of recovery at all stages in a lawsuit. This general right of recovery will be available even in cases where the claimant does not have an immediate right to possession, so long as no one else with an interest in the goods objects to such recovery.

The draft Act also contains innovative provisions that seek to clarify and control the self-help remedy of recaption, or recovery, of goods. In particular, the risk of, and liability for, injury to the person from whom the goods are sought, or to that person's property, are placed squarely on the party who is attempting to recover the goods. Furthermore, the right of that party to recover goods from a home is severely restricted in order to avoid volatile confrontations that could lead to personal injury and property damage.

The recommendations made in the Study Paper attempt to create a new, more comprehensive scheme that better serves modern commercial and consumer interests.

SUMMARY OF RECOMMENDATIONS

1. A REMEDIES FOR WRONGFUL INTERFERENCE WITH GOODS ACT

The existing causes of action and defences for wrongful interference with goods should be gathered into a *Remedies for Wrongful Interference with Goods Act*, to be modelled on the *Judicial Review Procedure Act*, R.S.O. 1980, c.224.

2. CONTRIBUTORY FAULT PRINCIPLE FOR WRONGFUL INTERFERENCE ACTIONS

The law of the province should provide that, where a claimant for relief for wrongful interference has been found to be contributorily at fault, the court should apportion any monetary relief granted. A corresponding provision should be made for an allowance in cases where the goods have been recovered, either by judicial order or by self-help. This provision should be under the province's general law on contributory fault. (An illustrative provision is included for the purpose of consideration in the proposed *Remedies for Wrongful Interference with Goods Act*.)

3. CONTRIBUTION PRINCIPLE FOR WRONGFUL INTERFERENCE ACTIONS

The law of the province should provide for contribution between wrongdoers each of whom contributed to the wrongful interference of the contribution claimant. This provision should be under the province's general law on contribution, and should give the court wide discretion in determining the contribution, so that, in determining liability, the court should be able to take account of the position of each wrongdoer's transaction in any chain of transactions between the true owner and the claimant. (An illustrative provision is included for the purpose of consideration in the proposed *Remedies for Wrongful Interference with Goods Act*.)

4. JUS TERTII DEFENCE FOR WRONGFUL INTERFERENCE ACTIONS

The proposed *Remedies for Wrongful Interference with Goods Act* should provide, in all wrongful interference actions, whether based on

possession or not, for a *jus tertii* defence (the right of a third party) with the following characteristics:

- (a) the third party should be identified, and provision made for joining him as a party to the action;
- (b) if the third party is not joined, or, being joined, fails to defend, or disclaims an interest, the defence should not be sustainable; but in the last two cases the court may deprive the third party of any right of action against the defendant;
- (c) the plaintiff should give particulars of his right or title and identify anyone who to his knowledge has or claims any interest in the goods;
- (d) the plaintiff holds the proceeds of the action in trust for any third party who was not joined but who has a better right to the interest on which the plaintiff relied;
- (e) where any third party who is not barred from doing so later sues the defendant, the defendant may claim an indemnity from the original plaintiff; and
- (f) the *jus tertii* defence should be subject to contrary agreement.

5. ALLOWANCE FOR IMPROVEMENTS TO GOODS WRONGFULLY INTERFERED WITH

The proposed *Act* should provide that, where the goods have been improved, the court may make an allowance to a person who wrongfully interfered with the goods who was the improver or was a purchaser who derived title from the improver and who acted reasonably, in accordance with the following:

- (a) the court should be provided with guidelines to assist it in determining reasonableness and whether or not to exercise its discretion;
- (b) the court may make an allowance in the form of an order for physical separation of the improvements, and in making a monetary allowance shall award the lesser of the cost or value of the improvements, unless it considers this would be unfair to the person receiving the allowance; and
- (c) in an action by a purchaser of improved goods against his seller based on failure of consideration, or for damages, the court shall make an allowance where appropriate.

6. DEFENCE FOR REASONABLE BELIEF IN ACQUISITION OF INTEREST

The proposed *Act* should provide for a defence that the defendant reasonably believed he had or was acquiring a legally recognized interest in the goods, subject to the following:

- (a) the defence should not be available for merchants as that term is defined in the Ontario Law Reform Commission's *Report on Sale of Goods*;
- (b) the defence should also be available in claims for contribution or for damages for breach of contract; and
- (c) the defence should not prevent the recovery of the goods, but should require the court to make an allowance to the person from whom they were recovered equal to the lesser of the cost or the value of the goods.

7. RIGHT TO RECOVERY *IN SPECIE* WHETHER OR NOT RIGHT TO POSSESS

The proposed *Act* should provide that in an action for wrongful interference with goods a party may claim recovery of possession whether or not he has a right to immediate possession, subject to the following:

- (a) he cannot be awarded possession where it is shown that some other person with an interest in the goods objects;
- (b) subject to the Rules of Civil Procedure the person so objecting may be joined as a party to the action; and
- (c) the successful party shall receive and hold the goods in trust for all persons with interests therein.

8. *PRIMA FACIE* RIGHT TO RECOVERY *IN SPECIE*

The proposed *Act* should provide that a successful party to an action for wrongful interference who has claimed recovery of possession shall be entitled, at his option, to an order for recovery unless the court is satisfied that some other disposition is more appropriate, the burden of which shall be on the party resisting the order. The court should be provided with guidelines to assist it in determining when some other disposition would be more appropriate.

9. INTERIM RECOVERY OF GOODS

The proposed *Act* should provide that, upon a showing of a *prima facie* case of wrongful interference with goods, the court shall make an order for interim recovery of goods unless satisfied that some other disposition is more appropriate. The court should be provided with guidelines to assist it in the exercise of such discretion.

10. CLARIFICATION OF SECTION 117 (2) OF THE COURTS OF JUSTICE ACT, 1984

Section 117(2) of the *Courts of Justice Act, 1984* should be clarified to indicate:

- (a) that a moving party who is successful on a motion for interim recovery of goods, and is unsuccessful in the action, may be held liable in damages for any loss caused by the interim recovery of goods sustained by another party;
- (b) conversely, a party who obtains possession of goods by setting aside an interim order and is unsuccessful in the action, may be liable in damages to the same extent as a moving party who obtains possession by virtue of an interim order.

11. AMENDMENT OF RULE OF CIVIL PROCEDURE 44.03

Rule of Civil Procedure 44.03 should be amended to clarify the court's power to order interim recovery of goods upon the moving party giving an undertaking as to damages.

12. USE OF FORCE BY SHERIFF IN ENFORCEMENT OF INTERIM AND FINAL ORDERS FOR RECOVERY OF POSSESSION

The law concerning the use of force by the sheriff in the enforcement of interim and final orders for recovery of possession should be the same as that concerning the use of force by him in the execution of process for the recovery of judgment debts as recommended in the Ontario Law Reform Commission's *Report on the Enforcement of Judgment Debts and Related Matters, Part II* (1981).

13. AMENDMENT OF RULE OF CIVIL PROCEDURE 44.07 (2)

Rule of Civil Procedure 44.07(2) should be amended to provide that the sheriff shall serve a copy of the order on the defendant and any person who to his knowledge or reasonable belief claims an interest in the goods.

14. EXAMINATION OF DEFENDANT WHERE SHERIFF ORDERED TO POSSESS GOODS

The power of the court to order the examination of the defendant or any other person should be made clear in cases where the sheriff is ordered to take possession of goods pursuant to an interim or final order for recovery of possession.

15. RECAPTION GENERALLY NO DEFENCE FOR INTERFERENCE WITH LAND OR GOODS

The proposed *Act* should provide that, subject to recommendation 16, in any action for interference with property, real or personal, it shall be no defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be a wrongful interference with the goods on the part of the person from whom the goods were taken or to be taken.

16. RECAPTION GENERALLY DEFENCE TO NOMINAL DAMAGES FOR TRESPASS TO LAND OR GOODS

The proposed *Act* should provide that, subject to recommendation 17, in any action for interference with property, real or personal, which is in the nature of an action for nominal damages arising out of trespass to goods or land *per se*, it shall be a defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be a wrongful interference with the goods on the part of the person from whom the goods were taken or to be taken.

17. RECAPTION NO DEFENCE TO NOMINAL DAMAGES ARISING OUT OF ENTRY INTO DWELLING

The proposed *Act* should provide that the defence established in recommendation 16 shall not be available in circumstances where the interference with property is entry into a dwelling house.

18. RECAPTION NO DEFENCE FOR INTERFERENCE WITH THE PERSON

The proposed *Act* should provide that, in any action for interference with the person, it shall not be a defence that the interference took place in the course of taking possession of goods the refusal to deliver possession of which would be a wrongful interference with the goods on the part of the person from whom the goods were taken or to be taken.

19. RIGHT TO DEFEND PEACEABLE POSSESSION EXCEPT AGAINST PERSON ENTITLED TO GOODS

The proposed *Act* should provide that a person in peaceable possession of goods shall be justified in using reasonable and necessary force in defence of that possession except against a person or someone acting by that person's authority the refusal to deliver possession of the goods to whom would be a wrongful interference with the goods.

20. RECAPTION RULES NOT WAIVABLE IN ADVANCE

The proposed *Act* should provide that the provisions of the sections concerning recaption (recommendations 15 through 19) shall operate notwithstanding any licence or consent, express or implied, granted or given prior to the commencement of an attempt to take possession of goods.

21. RECOVERY BY PERSON WITH POSSESSION OR RIGHT TO SAME AS IF OWNER

The proposed *Act* should provide that, in an action for wrongful interference with goods, any person with possession or the right to immediate possession should be able to claim monetary relief as if he were the owner of the goods, subject to the following:

- (a) he shall not so recover to the extent that another interest holder objects;
- (b) subject to the Rules of Civil Procedure the person so objecting may be joined as a party to the action; and
- (c) the person with possession or the immediate right to possession shall receive and hold the proceeds of the action in trust for all persons with interests therein.

A similar provision should be made for a person proceeding with the written authority of another interest holder. Apart from these provisions, the proposed *Act* should provide that a person should only recover monetary relief for interference with his own interest.

22. RIGHT TO IMMEDIATE POSSESSION SUFFICIENT FOR TRESPASS CLAIMS

The proposed *Act* should provide that a right to immediate possession should be sufficient for actions for wrongful interference in the nature of trespass.

23. INTEREST SUFFICIENT FOR CONVERSION SUFFICIENT FOR DETINUE AND *VICE VERSA*

The proposed *Act* should provide that an interest sufficient for actions for wrongful interference in the nature of conversion should be sufficient for ones for wrongful interference in the nature of detinue, and *vice versa*.

24. REVERSIONARY INTEREST SUFFICIENT FOR CONVERSION CLAIM

The proposed *Act* should provide that a reversionary interest should be sufficient for an action for wrongful interference in the nature of conversion.

25. DELIVERY OR RECEIPT IN PLEDGE SUFFICIENT FOR CONVERSION

The proposed *Act* should provide that an interference with goods in the nature of a delivery or receipt by way of pledge should be sufficient interference for an action for wrongful interference in the nature of conversion.

26. WRONGFUL INTERFERENCE CLAIMS BY CO-OWNERS

The proposed *Act* should provide that a co-owner of goods may bring an action for wrongful interference if the interference would have been sufficient for such an action by him if he were the sole owner.

27. TWO YEAR LIMITATION PERIOD FOR GOOD FAITH INTERMEDDLERS WITH GOODS

The limitations of actions legislation of the province should provide that the limitation period for actions for wrongful interference with goods by persons without possession, against persons who were good faith purchasers of the goods for value, should be two years from the date of the first transaction in the chain of transactions leading to the defendant which, apart from the *Act*, would be styled a conversion, or the defendant's wrongful interference, whichever is the earlier.

28. RUNNING OF TIME FROM FIRST DISPOSITION OR DEFENDANT'S INTERFERENCE

Subject to recommendation 27, the limitations legislation should provide that in actions for wrongful interference with goods by persons without

possession the relevant limitation period should run from the date of the first transaction in the chain of transactions leading to the defendant which, apart from the *Act*, would be styled a conversion in the form of a disposition to a good faith purchaser for value, or the defendant's wrongful interference, whichever is the earlier.

29. EXPIRY OF LIMITATION PERIOD AND TITLE

The limitations legislation should provide that the expiry of the relevant limitation period for an action for wrongful interference with goods which, apart from the *Act*, would be styled a conversion, including an action by a holder of a reversionary interest, shall extinguish the title of a person without possession otherwise entitled to bring the action as against, but only as against, the person entitled to the benefit of the relevant period.

30. LIMITATION PERIODS NOT TO AVAIL THIEF OR RECEIVER

The limitations legislation should provide that a thief or receiver of stolen goods shall not be entitled to the benefit of any limitation period in respect of the goods stolen.

31. AMENDMENT TO *LANDLORD AND TENANT ACT*

Part IV of the *Landlord and Tenant Act*, R.S.O. 1980, c.232, should be amended to give a judge of the District Court power to hear a tenant's application for recovery of possession of goods or of their value from a landlord who wrongfully interfered with the tenant's goods.

32. AMENDMENT TO *CONSUMER PROTECTION ACT*, SECTION 23(1)

The *Consumer Protection Act*, R.S.O. 1980, c. 87, section 23 (1) should be amended to make it clear that the protection of section 23 (1) extends to security interests under the *Personal Property Security Act*, 1989, S.O. 1989, c. 16, s. 62(a).

33. *ACCESSIO, CONFUSIO AND SPECIFICATIO* ISSUES

Further study should be undertaken concerning effects on title to goods where they are attached to, mingled with, or transformed into other goods—sometimes called *accessio*, *confusio*, and *specificatio*.



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Commission de réforme du droit de l'Ontario

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